



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 27 2004

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Procedure and Framework for Reviewing Requests for No Action Assurance to Address a Temporary Fuel Supply Shortage

FROM: Walker B. Smith, Director *Walker B. Smith*
Office of Regulatory Enforcement

TO: Director, OAR Office of Transportation and Air Quality
Regional Air Program Managers
Regional Counsels

The Office of Enforcement and Compliance Assurance (OECA) has on occasion provided no action assurances in instances where a potential fuel supply shortage has occurred in a defined geographic area.¹ Two previous guidance documents establish a general framework for OECA's consideration of requests for no action assurances: Policy Against "No Action" Assurances (Nov. 16, 1984), and Processing Requests for Use of Enforcement Discretion (March 3, 1995). While these documents continue to guide us, our experience with fuel supply shortage situations indicates a need to clarify both the procedure to be followed in making such requests and the framework for analyzing whether an exercise of discretion to not enforce a requirement ("no action assurance") is appropriate. This memorandum is intended to clarify these two issues. This memorandum does not modify or otherwise change the basic no action assurance policy described in the two prior guidance documents.

In addition, EPA is currently analyzing whether, and under what circumstances, it may be appropriate to assess a penalty where non-compliant fuel is used. At this time, no decision has been made on the penalty question. Thus, this memorandum does not address when penalties may or may not be appropriate in a fuel supply shortage situation.

Early notification to EPA regarding a potential fuel supply shortage is essential when a party anticipates that a no action assurance may be necessary to ameliorate a fuel supply shortage. This is true because providing a no action assurance to address a shortage of compliant fuels is not routinely given, and is appropriate only in extreme situations where no legal alternative exists, and then only to the extent necessary. EPA generally will not issue a no action assurance

¹ Fuel supply shortage situations involve the fuel regulations at 40 C.F.R. pt. 80 and state fuel regulations incorporated into State Implementation Plans (SIPs).

unless there is a generalized shortage of compliant fuel throughout a geographic area. Accordingly, early contact with EPA is essential to allow sufficient time for a thorough analysis of whether a potential fuel supply shortage warrants a no action assurance.

This guidance:

- a. Describes the procedure to be used when requesting a no action assurance in the fuel supply shortage context;
- b. Identifies the primary OECA contact;
- c. Describes the information that should be provided in making a request, including, among other things the factual bases demonstrating the existence of a shortage of compliant fuels, the cause, magnitude, duration, etc.; and
- d. Describes the fuel supply shortage no action assurance communications plan.

I. Procedure for Seeking a No Action Assurance and Content of Requests

A. Form of Request

A person or entity (*e.g.*, a refiner or state) requesting a no action assurance in a fuels supply shortage situation should make the request in writing, and direct the request to the Assistant Administrator for Enforcement and Compliance Assurance. The request should provide sufficient background and a factual description of the matter, and discuss in detail the reasons justifying the request, focusing in particular on the factors outlined in section I.C. below.

As noted above, to the extent possible, a request should be sent well in advance of the date regulatory relief is needed to allow time for OECA to evaluate the request and to provide for a timely decision. Where immediate and emergency situations arise, such as those occasioned by natural disasters, EPA will work closely with the requester to ensure such situations are promptly and appropriately addressed. However, as a general matter, an expedited response to a last-minute request is not appropriate absent exigent or emergency circumstances.

B. Primary EPA Contact

The primary OECA contact for fuels supply shortage issues is the Mobile Source Enforcement Branch Chief within the Air Enforcement Division of the Office of Regulatory Enforcement. Close coordination with the primary OECA contact should occur prior to sending any request, and copies of all requests should be sent to the primary OECA contact. At this time, the contact is George Lawrence who can be reached at (202) 564-1307, or lawrence.george@epa.gov.

C. Information to be Included in a Request

All requests for a no action assurance should include, at a minimum, the elements outlined below. However, a particular situation may require the consideration of additional factors, which also should be included in the request.

1. The person(s) or entity(ies) that is without, or anticipated to be without, fuel (including the area's percentage of parties out of fuel and whether those parties purchase fuel on contract or on the spot market). If the shortage is projected to occur in the future, include the estimated date when the shortage will occur;
2. The geographical area of the actual or anticipated shortage;
3. The cause of the shortage (natural disaster, pipeline break, etc.);
4. The terminals contacted by the requesters for fuel (including terminals in and outside the area experiencing the fuel supply shortage) and the names and telephone numbers of those persons contacted;
5. The alternative fuel sources of compliant fuel the requester has considered (including where, when, how, etc.);
6. The amount of available fuel from each contacted terminal/person (*e.g.*, no fuel available at any price, fuel available on allocation);
7. The date(s) the contacted terminal(s) will receive its next shipment of fuel;
8. An analysis of whether the gasoline supply shortage to be addressed is unique or exceptional, or is shared on a wider geographical basis;
9. An analysis of options (other than a no action assurance) for addressing the supply shortage (*see* section D, below);
10. The type and characteristic(s) of alternative fuel that is available (*see* section E, below);
11. A description of the specific regulatory relief that is being requested (*see* section F, below);
12. A description of the environmental consequences of the requested relief (*see* section G, below); and

13. A discussion of the impact of the requested relief on other regulated parties (see, section H, below).

D. Unavailability of Alternative Legal and other Mechanisms

The request should include a discussion of other available options, and why they are not viable. A no action assurance is only appropriate where no other legal or regulatory mechanisms exist to adequately address the situation.

Similarly, increased costs or difficulties associated with providing compliant fuels (*e.g.*, a need to ship supplies over greater distances to alleviate a shortage) is not, absent extraordinary circumstances, a sufficient basis to allow the use of noncompliant fuels. The request should, therefore, first discuss the alternative mechanisms considered and why those mechanisms are unworkable or inadequate.

E. Alternative Fuel Availability

The request should discuss the alternative fuel that would be available to address the supply shortage. The request should identify the type and characteristics of the alternative fuel and from whom the alternative fuel is available. The request should identify the specific entities that can supply the alternative fuel, the quantity of the alternative fuel that is available, and when the fuel will become available. In addition, the request should include an analysis of the impact on the markets normally supplied by this alternative fuel if a no action assurance is provided, and specifically whether the requested diversion will affect supplies to those markets.

The request should address whether the adverse environmental impacts of a no action assurance could be mitigated by specifying an alternative fuel with properties that are as close to the compliant fuel as possible, and whether alternative fuel with these properties could be available.

F. Specific Relief Requested

The request should identify the specific relief being sought, including who is to receive the relief, the affected geographic area, the properties of the alternative fuel to be supplied, the duration of time for which the relief is sought, and any other conditions that the requester believes should be included in the no action assurance.

Open-ended or long-term promises not to enforce, or to exercise or refrain from exercising an authority, are generally not justifiable. A no action assurance is a temporary action of fixed duration to address unique circumstances that have resulted in a fuel supply shortage, and should extend for only the minimum amount of time necessary to alleviate or address the situation.

G. Environmental Consequences and Impact on Public Health or Safety/ Other Public Benefit

The request should evaluate the potential positive, neutral or negative environmental consequences of the proposed no action assurance. Because the use of noncompliant fuel can be expected to have an adverse impact on air quality, an analysis of the environmental impact of the proposed exercise of discretion should be included. The request should also detail any other potential positive or negative health or safety impacts. Analysis of the appropriateness of a no action assurance should identify prominently where the use in a given circumstance would alleviate or reduce severe human hardship or other risk to public health or safety.

H. Fairness to the Regulated Community and Recipients of Relief

The request should also consider whether the proposed beneficiary(ies) of a no action assurance faces a unique situation as compared to others in the regulated community. EPA is particularly concerned about the creation of an unfair competitive advantage through providing a no action assurance. Thus, requests should evaluate the fairness of the proposed no action assurance both to the potential recipient/beneficiary as well as to the wider regulated community. In a situation where the state and/or local environmental authority is not the party seeking the no action assurance, the requester should discuss whether the state and the local environmental authorities agree that a supply shortage does or will exist, and whether the state and local environmental authorities concur that the requested relief is appropriate and justified in light of any adverse environmental consequences.

II. Communications Plan

The request should include contact instructions as well as a plan for notifying the requesting parties. If, after reviewing a request, OECA provides a no action assurance, OECA will notify the requester, the Office of Air and Radiation's Office of Transportation and Air Quality (OTAQ), the Regional Administrator and Regional Air Program Manager of the affected Region. OECA will strive to post new no action assurances on its website within 24 hours of their approval, at: <http://www.epa.gov/compliance/resources/policies/civil/caa/mobileguid.html>.

In addition, OECA will attempt to notify affected parties by sending the no action assurance to its group list by electronic mail once the no action assurance has been signed. The group list will be comprised of E-mail addresses of interested parties, including the regulated community, states and associations.² If you wish to be added to the group list, send an email with your name, organization and telephone number to the OECA primary contact.

² If you have received this memorandum from EPA by E-mail, you are already included on the list of those who will receive notification of each no action assurance.